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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

TARLTON AND SON, INC., Employer/Respondent, and ROBERT MUNOZ, An Individual/Charging Party.	Case No. 32-CA-119054; 32-CA-126896 **CHARGING PARTY'S REPLY BRIEF TO AMICUS BRIEF**

Pursuant to the Board's Order allowing the filing of an Amicus Brief, the Charging Party files this Reply Brief.

The General Counsel has squarely placed before the Board the broader issue of whether an arbitration agreement can prohibit any form of concerted claim in any form of litigation. See the Answering Brief filed on February 26, 2109. The General Counsel believes the issue was within the scope of the complaint and the Board cannot avoid the confrontation on this issue. Cf. *Coastal Marine Services, Inc.*, 367 NLRB No. 58, slip op. at 1 fn. 2 (2019), and *Montecito Heights Healthcare & Wellness Centre, LP*, 367 NLRB No. 57, slip op. at 1 fn. 1 (2019). See also footnote 2 to the Decision of the Administrative Law Judge. The Brief of the general counsel now squarely raises these issues.

This means the Board will have to decide the issues which it has declined to decide in the above cases. The General Counsel has certainly clarified his positon in his Answering Brief.

It is also undisputed that Counsel for Tarlton conceded in writing that the FUAP was implemented in response to the lawsuit. GC Exhibit 4 at page 1.

Moreover, it was implemented in response allegedly to the position of the Carpenters Union which represented some of Tarlton's employees. Thus it was implemented because of the alleged agreement with that union which is arguably protected by Section 7 as a right to refrain or the right to engage in protected concerted activity. Although the Board discredited the claim that there was an agreement (Decision p 2), Tarlton's assertion that it was implemented in agreement with the Carpenters establishes that Tarlton acted in response to what it asserted was protected activity. Assuming that no agreement was reached it is undisputed that it was implemented after Tarlton had consulted with the Carpenters Union. Surely an alleged agreement with a union as alleged by Tarlton constitutes action by an employer in response to protected concerted activity or the refraining from such activity.

The General Counsel's assertion that *Beyoglu*, 362 NLRB No. 152 (2015) should be overruled should be rejected. The General Counsel forgets or doesn't care that there were three plaintiffs, not just one. They plainly were acting concertedly even if on only their own behalf. Three people acting together on their own behalf or on behalf of others is concerted activity. Nowhere does the General Counsel concede this. The Board should admonish the General Counsel for deliberately misstating the undisputed evidence that there were three plaintiffs.[1]

The position of the General Counsel, as stated in his December 30, 2018, position statement, is as follows:

> The General Counsel is now of the view that no violation of the Act occurred when Respondent implemented the Arbitration

[1] It also is important that the Charging Party challenged the waivers the current workers were required to sign. See Charging Party Exhibit 1 (rejected). Nor has the General Counsel ignored the allegations of the Complaint that the plaintiffs sought reliefs for themselves including injunctive relief even if there was no class action.

> Policy in response to its employees' concerted activities because a joint filing of a non-NLRA legal claim is not protected by the Act under the Supreme Court's implicit holding in *Epic Systems*. The General Counsel seeks to dismiss this Complaint and urges the Board to overturn legal precedent that establishes that filing of a joint class action lawsuit is protected activity within the meaning of Section 7 of the Act.

General Counsel's Position Statement at 2 (footnote omitted).

The General Counsel restates this in the Answering Brief:

> "It [The NLRA] does not provide a cause of action for retaliation for the exercise of non-NLRA protected activities. Recognition of this principle in conjunction with the required application of *Epic Systems* warrants the overruling of not only Beyoglu but also other cases that have held that the joint filing of a lawsuit to vindicate a non-NLRA claim is protected concerted activity under the Act." See p 8-9.

The Amicus Brief of the AFL-CIO highlights why these paragraphs are stunning in their breadth and outrageous in concept. The General Counsel is now taking the position that any joint, combined, shared, partnered, pooled, assigned, matched, mutual, amalgamated, consolidated, representative, concerted, coordinated, united or other action brought in any forum can be prohibited by an arbitration agreement. The Amicus Brief illustrates why this is contrary to decades and decades of Board law as approved by the courts. This means that an employer could discipline an employee for, concertedly with other employees or on behalf of others, seeking the assistance of any state or federal agency over any matter of "mutual aid or protection." If an employer implements a lawful policy, it follows that it can enforce the policy by discipline. Even that should be too much for this Board to accept. See *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019) (reaffirming *Meyers Industries*, 281 NLRB 882 (1986)).

The General Counsel's position runs contrary the preemption problem which it creates. This means that only a non-NLRA protected claim could be filed. Such a claim would likely be preempted. So there would be no claim anyone could file in any litigation forum (arbitration, administrative agency, court) which would be protected. The General Counsel has not thought that problem through.

The Board is squarely confronted with the issue of whether it will accept the position of the General Counsel or reaffirm the right employees have to bring such concerted claims in any forum other than on the street s with picketing, striking, boycotting and assembly. We need not detail the multiple ways in which employees can join together. They are almost endless. This arbitration agreement prohibits such action by employees to concertedly protect, advance, and pursue their rights to a decent workplace.

A violation of this policy could lead to discipline. The phrasing of the General Counsel's position even goes so far as to say that if an employee brings one claim, another employee cannot join the claim or can't even join in the claim to oppose or support the claim. After all, opposition is a Section 7 right to "refrain" by opposing. The extraordinary breadth of the General Counsel's position is wrong.

The Board cannot avoid this issue. The General Counsel's theory is clear that it is not unlawful to implement a policy to block any concerted action even if not a class or collective action under federal law governed by the Federal Arbitration Act. This Board cannot rely on such cases as *Coastal Marine Services, Inc.*, 367 NLRB No. 58, slip op. at 1 fn. 2 (2019), and *Montecito Heights Healthcare & Wellness Centre, LP*, 367 NLRB No. 57, slip op. at 1 fn. 1 (2019), because the General Counsel has expressed his theory of the case.

Finally, we remind the Board that the FUAP extends to all disputes "relating to the employment relationship" with only three exceptions (workers compensation, unemployment claims or any "any claim that could be made to the National Labor Relations Board"). This would then apply to disability claims under state law and claims for Family Temporary Disability and other state and federal provided benefits for which the employer has no control. It does not exclude claims under employee benefit plans for which ERISA has separate procedures for resolution.

The Board is also reminded that the FUAP imposes a cost on such claims. It requires the employee to share the cost "of the AAA's filing fee and the arbitrator's fees and costs, but [the employee's] share of such fees and costs shall not exceed an amount equal to [the employee's]

local court filing fee." The local court filing fee is a minimum of either $375 or $435. See Superior Court of California Statewide Civil Fee Schedule (Jan. 1, 2019), at http://www.fresno.courts.ca.gov/fees_schedule/documents/Statewide%20Civil%20Fee%20Schedule%20January%202019.pdf. The FUAP prohibits employees from sharing that cost by filing multiple or representative claims[2] or a union from filing the claims that are assigned to it. It imposes a filing fee that does not exist before many state or federal agencies, including the Labor Commissioner.

The General Counsel's position confronts the First Amendment right of association. The argument of Tarlton and the General Counsel point out why the Federal Arbitration Act cannot be used to thwart the right of workers to associate through concerted activity. If the right to associate includes the right to attempt collective action in the courts, administrative agencies or public demonstrations, then the FAA cannot shield the employer's policy prohibiting such associational activity. The Supreme Court has found such a right in labor activity. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982). The Supreme Court has indicated that "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." *Bhd. of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 8 (1964). Thus, the FAA cannot constitutionally limit the right of association, including the associational right of employees to petition or act concertedly with respect to their employer. Cf. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 2002.

For these reasons and the reasons stated in our prior position statements as well as the Amicus Brief, the Board should find the implementation of the FUAP in response to protected concerted activity to be unlawful. In the alternative, the Board should limit the impact of *Epic Systems, et al.* to the facts of the cases, which are limited to class or collective actions under

[2] The state fee schedule imposes additional costs for filing motions etc., which the FUAP would require the employees to pay, making the costs in arbitration even more expensive. The Board has yet to allow employers to put a cost of any amount on the right to pursue concerted activity. This should not be the first time.

federal law in federal courts governed by the Federal Arbitration Act. It should find that the implementation of the policy in response to protected concerted activity is unlawful as to any other any joint, combined, shared, partnered pooled, assigned, matched, mutual, amalgamated, consolidated, representative, concerted, coordinated, united or other action brought in any forum. This includes this FUAP, which makes the FUAP remedy exclusive, which would foreclose other forms of concerted activity such as a strike, boycott or publicity campaign.

Dated: February 26, 2019

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
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/s/ David A. Rosenfeld
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Attorneys for Charging Party ROBERT MUNOZ

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CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 26, 2019, I served the following documents in the manner described below:

CHARGING PARTY'S REPLY BRIEF TO AMICUS BRIEF

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 26, 2019, at Alameda, California.

/s/ Karen Kempler
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